

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MATTHEW LACY,) Civil No. 10cv0830 JM(RBB)
)
Plaintiff,) **ORDER DENYING PLAINTIFF'S**
) **MOTION TO AMEND SCHEDULING**
v.) **ORDER TO ALLOW FILING OF MOTION**
) **TO COMPEL AND COMPLETION OF**
) **DISCOVERY [ECF NO. 16]**
AMERICAN BILTRITE, INC.,)
EMPLOYEES LONG TERM DISABILITY)
PLAN and/or CONGOLEUM CORPORATION)
EMPLOYEES LONG TERM DISABILITY)
PLAN, METROPOLITAN LIFE INSURANCE)
COMPANY,)
)
Defendants.)
_____)

On June 17, 2011, Plaintiff filed a Motion to Amend Scheduling Order to Allow Filing of Motion to Compel and Completion of Discovery, along with a Memorandum of Points and Authorities, the Declaration of George De La Flor, and exhibits [ECF No. 16]. After several joint requests to continue the hearing on the Motion, on January 9, 2012, Defendants' Opposition to Plaintiff's Motion to Amend Scheduling Order to Allow Filing of Motion to Compel and Completion of Discovery was filed, along with the Declaration of Robert K. Renner and exhibits [ECF No. 30]. Plaintiff's Reply to Defendant's Opposition to Motion to Amend Scheduling Order was

1 filed on January 16, 2012 [ECF No. 32]. The Court finds the Motion
2 suitable for determination without oral argument. See S.D. Cal.
3 Civ. L.R. 7.1(d)(1).

4 In his Motion to Amend Scheduling Order, the Plaintiff seeks
5 to extend the time allowed to complete discovery and to file
6 pretrial motions by ninety days. (Mot. Amend Scheduling Order 1-2,
7 ECF No. 16; id. Attach. #1 Mem. P. & A. 9.) Plaintiff also seeks
8 to amend the Scheduling Order for a period of time sufficient to
9 allow the "parties" to file appropriate motions to compel. (Mot.
10 Amend Scheduling Order 1-2, ECF No. 16.)

11 I.

12 **FACTUAL BACKGROUND**

13 Plaintiff Matthew Lacy brought this lawsuit to recover ERISA
14 benefits. On April 19, 2010, Lacy filed a Complaint alleging that
15 he was employed as a salesman for Defendant Congoleum Corporation,
16 which is a subsidiary of Defendant American Biltrite, Inc. (Compl.
17 2, ECF No. 1.) Lacy was covered by a long-term disability plan
18 with those companies. (Id.) Defendant Metropolitan Life Insurance
19 Company was the group insurance provider and administrator of the
20 plan. (Id.)

21 Plaintiff asserts that in 2002 he suffered a traumatic brain
22 injury during the course of his employment. (Id.) Specifically,
23 he alleges he was injured by a flying golf ball while entertaining
24 clients on a golf course. (Id. at 2-3.) At that time, Lacy was
25 not informed of the benefits available under the company disability
26 plan. (Id. at 3.) The Plaintiff returned to work after a period
27 of rehabilitation. (Id.) Lacy maintains that in May 2007, his
28 health began to decline, and he was unable to work. (Id.)

1 Plaintiff applied for disability benefits after the qualifying
2 time, but his claim was denied because he had been deemed capable
3 of working. (Id.) Lacy's appeals of the denial were all denied.
4 (Id.)

5 **II.**

6 **PROCEDURAL HISTORY**

7 This Motion to Amend has a protracted history. On September
8 24, 2010, the Court held a case management conference and issued
9 the Case Management Conference Order Regulating Discovery and Other
10 Pretrial Proceedings [ECF No. 11]. The discovery cutoff was set
11 for May 23, 2011, and trial was scheduled for November 21, 2011.
12 (Case Management Conference Order 6, ECF No. 11.) This Court held
13 settlement conferences on February 8, March 8, April 19, and June
14 15, 2011 [ECF Nos. 12-15]. Plaintiff filed this Motion to Amend on
15 June 17, 2011, and it was set to be heard on July 25, 2011. (Mot.
16 Amend 1, ECF No. 16.)

17 On June 30, 2011, the parties filed their first joint request
18 seeking to continue the motion hearing thirty days [ECF No. 19].
19 Plaintiff's lead attorney at the time, George de la Flor, had a
20 heart attack on June 27, 2011, which was the basis for the parties'
21 request to continue. (Joint Mot. Thirty-Day Continuance 2, ECF No.
22 19.) Co-counsel of record, James Vallee, remained on the case with
23 George de la Flor. The Court granted the request and continued the
24 motion hearing to September 6, 2011 [ECF No. 20].

25 On July 27, 2011, the parties filed a second joint motion to
26 continue the hearing on the Motion to Amend as well as all of
27 outstanding dates in the scheduling order by 120 days, in light of
28 de la Flor's health [ECF No. 21]. The request was granted on July

1 29, 2011, and the hearing on Plaintiff's Motion to Amend was
2 continued to December 12, 2011 [ECF Nos. 23, 24]. Trial was
3 continued to March 26, 2012, but the May 23, 2011 discovery cutoff
4 was not reopened and continued. (Order Granting Joint Mot.
5 Continue Certain Dates 2, ECF No. 23.) The Court stated, "The
6 continuance does not apply to any deadlines in the Scheduling Order
7 that had already lapsed on June 27, 2011, specifically the May 23,
8 2011 discovery cutoff." (Id.)

9 Approximately two and one-half months later, on October 12,
10 2011, attorney Jeffrey Metzger filed a request to substitute as
11 counsel of record in place of George de la Flor and his co-counsel,
12 James Vallee; the district court approved the request [ECF Nos.
13 25-26].

14 The parties filed a third joint motion to extend the hearing
15 date and briefing schedule relating to Plaintiff's Motion to Amend,
16 which had been filed more than five months earlier [ECF No. 27].
17 The parties asserted that Plaintiff's new counsel, Jeffrey Metzger,
18 had informed Defendants "that based on his review of the previously
19 propounded discovery, he was not inclined to pursue the vast
20 majority of it." (Joint Mot. Br. Continuance 1, ECF No. 27.) The
21 Court granted the parties' request and continued the motion hearing
22 to January 23, 2012 [ECF No. 28]. The Court took the Motion to
23 Amend Scheduling Order under submission [ECF NO. 29]. On January 9
24 2012, the Defendants filed an Opposition to Plaintiff's Motion to
25 Amend [ECF No. 30]. Plaintiff's Reply to Defendants' Opposition
26
27
28

1 was filed on January 16, 2012, by Lacy's current attorney, Jeffrey
2 Metzger [ECF Nos. 30, 32].¹

3 Next, the parties filed a joint motion to vacate the February
4 24, 2012 pretrial conference and asked for leave to file
5 simultaneous opening and responding trial briefs in lieu of
6 standard pretrial contentions [ECF No. 34]. The district court
7 granted the parties' request and scheduled oral argument for March
8 26, 2012 [ECF No. 35]. The parties then asked that the oral
9 argument be continued in light of the pending Motion to Amend, and
10 the district court reset the hearing date for June 4, 2012 [ECF
11 Nos. 37-38]. Under the current schedule, opening briefs must be
12 filed by April 30, 2012, and responding trial briefs must be filed
13 by May 21, 2012 [ECF No. 38].

14 III.

15 LEGAL STANDARDS

16 District courts are given broad discretion in supervising the
17 pretrial phase of litigation. Zivkovic v. Southern Cal. Edison
18 Co., 302 F.3d 1080, 1087 (9th Cir. 2002) (quoting Johnson v.
19 Mammoth Recreations, Inc., 975 F.2d 604, 607 (9th Cir. 1992)).
20 Federal Rule of Civil Procedure 16(b) provides that district courts
21 must issue scheduling orders to establish deadlines for, among
22 other things, the time to complete discovery and file motions.
23 Fed. R. Civ. P. 16(b)(3)(A). The dates in a scheduling order "may
24 be modified only for good cause and with the judge's consent."
25 Fed. R. Civ. P. 16(b)(4).

26
27 ¹ Although Plaintiff has retained new counsel, the events
28 giving rise to the Motion to Amend took place while Lacy was
represented by two attorneys, George de la Flor and James Michael
Vallee.

1 In assessing whether there is "good cause" under Rule 16(b),
2 the court "primarily considers the diligence of the party seeking
3 the amendment" and the "moving party's reasons for seeking
4 modification." Johnson, 975 F.2d at 609; see Zivkovic, 302 F.3d at
5 1087 ("The pretrial schedule may be modified 'if it cannot
6 reasonably be met despite the diligence of the party seeking the
7 extension.'" (citation omitted). The diligence of the party
8 seeking to extend deadlines is the touchstone for deciding whether
9 the request should be granted. "Although the existence or degree
10 of prejudice to the party opposing the modification might supply
11 additional reasons to deny a motion, the focus of the inquiry is
12 upon the moving party's reasons for seeking modification. If that
13 party was not diligent, the inquiry should end." Johnson, 975 F.2d
14 at 609 (internal citation omitted). "[C]arelessness is not
15 compatible with a finding of diligence and offers no reason for a
16 grant of relief." Id.; see Wei v. State of Hawaii, 763 F.2d 370,
17 372 (9th Cir. 1985) (discussing Rule 4(j) of the Federal Rules of
18 Civil Procedure and holding that the inadvertent failure to
19 calendar a deadline did not constitute excusable neglect or good
20 cause).

21 IV.

22 DISCUSSION

23 The Plaintiff seeks to extend the time allowed to complete
24 discovery and file pretrial motions, including motions to compel.
25 (Mot. Amend Scheduling Order 1-2, ECF No. 16; id. Attach. #1 Mem.
26 P. & A. 9.) First, Lacy desires to file a motion to compel a
27 further response to written discovery that was served after the
28 March 21, 2011 deadline. (See id. Attach. #1 Mem. P. & A. 2-3.)

1 Counsel states that he "inadvertently overlooked the sentence at
2 page 2 of the Order providing, 'All interrogatories and document
3 production requests must be served by March 21, 2011.'" (Id. at
4 2.) Second, Plaintiff requests leave to move to compel deposition
5 testimony after the discovery cutoff; he ignores the related
6 thirty-day deadline to act on objections to discovery. (See id. at
7 2-3.) As discussed below, the Motion to Amend Scheduling Order and
8 the proposed motions to compel are untimely on several grounds.

9 Lacy argues that both the written and oral discovery he seeks
10 to compel are "fully permissible" in an ERISA action and are
11 "vitally important" to the preparation and presentation of his
12 case. (Id. at 4.) He asserts that Ninth Circuit law permits
13 plaintiffs in ERISA lawsuits to obtain discovery beyond the
14 administrative record where an inherent conflict exists. (Id. at
15 6.) Plaintiff contends that discovery is necessary to ascertain
16 whether the insurance plan administrator followed appropriate
17 procedures in deciding the claim. (Id. at 7.) In this case, Lacy
18 maintains that the plan administrator had a dual responsibility for
19 determining whether a plan participant was eligible for disability
20 benefits and for paying those benefits. (Id. at 6-7.) Thus, the
21 requested information is critical to determine whether this
22 inherent conflict of interest influenced Defendants' decision to
23 deny benefits. (Id. at 6, 8-9.)

24 At the eleventh hour, Lacy's attorneys filed this Motion to
25 extend lapsed deadlines and cure the timeliness issues raised by
26 their discovery requests. They appear to seek wide-ranging
27 discovery to develop a conflict for the ERISA plan administrator
28 that would affect the standard of review and provide information so

1 the district court could conduct a de novo review of the plan
2 administrator's decision. See Abatie v. Alta Health & Life Ins.
3 Co., 458 F.3d 955, 968, 971 (9th Cir. 2006) (en banc).

4 **A. Written Discovery**

5 Lacy's request to extend deadlines so that he can move to
6 compel further responses to his interrogatories, requests for
7 admissions, and requests for production of documents is untimely on
8 two grounds. First, he seeks to compel responses to written
9 discovery that was served on April 13, 2011, nearly one month after
10 the March 21, 2011 deadline for serving interrogatories and
11 requests for production. Second, the Motion seeking to extend
12 deadlines was filed on June 17, 2011, after the May 23, 2011 close
13 of all discovery.

14 **1. Discovery served after the written discovery cutoff**

15 On September 24, 2010, this Court issued a Case Management
16 Conference Order Regulating Discovery and Other Pretrial
17 Proceedings [ECF No. 11]. There, the Court instructed, "All
18 interrogatories and document production requests must be served by
19 March 21, 2011." (Case Management Conference Order 2, ECF No. 11.)
20 Lacy's attorneys did not serve the interrogatories, requests for
21 production of documents, and requests for admissions until April
22 13, 2011. In fact, they failed to conduct any discovery before
23 that date.

24 Attorney de la Flor stated that he -- and presumably his co-
25 counsel -- inadvertently overlooked the March 21, 2011 written
26 discovery deadline and thought that all discovery, including
27 written, had to be completed by May 23, 2011. (Mot. Amend
28 Scheduling Order Attach. #2 Decl. de la Flor 3, ECF No. 16.) He

1 asserts he erroneously calendared the cutoff date to serve
2 discovery as April 20, 2011, and waited until "the adverse Social
3 Security ruling was entered and the appeal underway" before taking
4 any discovery. (Id.) In his declaration, Plaintiff's counsel
5 merely submits, "By the time of the April 19 [settlement]
6 conference, I had learned that Plaintiff had been denied his SSDI
7 claim. Approximately contemporaneous with my getting this news, I
8 propounded the first round of discovery in this matter [on April
9 13, 2011]." (Id. at 2-3.) Counsel does not specify when he and
10 his co-counsel, James Vallee, actually learned of the adverse
11 ruling, even though de la Flor attributed the nearly seven-month
12 delay in commencing discovery to the fact that Lacy's social
13 security claim was still pending.

14 The Social Security Administration informed Plaintiff Lacy
15 that his request for benefits was denied on December 9, 2010.
16 (Opp'n Attach. #2 Ex. A, at 6-8, ECF No. 30.) Amit Vagal,
17 Plaintiff's attorney for the social security matter, also received
18 a copy of the denial letter. (Id.; see Opp'n 4, ECF No. 30.) From
19 the date of the decision, Plaintiff had more than three months to
20 propound written discovery before the March 21, 2011 cutoff. On
21 March 8, 2011, Plaintiff's co-counsel forwarded a copy of the
22 social security ruling to defense counsel. (Opp'n Attach. #2 Ex.
23 A, at 2, ECF No. 30.) Even then, Lacy's attorneys had two weeks to
24 serve written discovery before the March 21, 2011 deadline. They
25 waited until April 13, 2011, when Lacy's counsel served
26 interrogatories, requests for admissions, requests for product of
27 documents, and deposition notices. This was almost seven months
28 after the Court issued its scheduling order, four months after

1 Plaintiff learned of the adverse administrative decision, one month
2 after Lacy's counsel informed defense counsel of the adverse
3 decision, and twenty-three days after the deadline to complete
4 written discovery.

5 **2. Motion to Amend filed after the close of all discovery**

6 The scheduling order provides, "All discovery shall be
7 completed by all parties on or before May 23, 2011; this includes
8 discovery ordered as a result of a discovery motion." (Case
9 Management Conference Order 1, ECF No. 11) (emphasis added). Thus,
10 the attorneys were required to initiate all discovery in advance of
11 the cutoff date so that it may be completed by that date, taking
12 into account time for service, responses, and motions to compel.

13 The Defendants objected to the Plaintiff's written discovery
14 on timeliness grounds on May 16, 2011. There was still one week
15 before the discovery cutoff, during which Lacy could have either
16 filed a motion or requested an extension of time to do so.
17 Nonetheless, Lacy let the May 23, 2011 discovery cutoff pass.

18 **3. Analysis**

19 The procedural posture of this case has vastly changed since
20 Lacy filed this Motion, more than eight months ago. At that time,
21 according to Plaintiff, "relatively little activity" had occurred
22 in the case, and litigation was essentially in a "holding pattern"
23 while he pursued, and appealed the denial of, his request for
24 disability benefits. (Mot. Amend Scheduling Order Attach. #1 Mem.
25 P. & A. 1-2.) The Plaintiff had not sought any previous extensions
26 of time, trial was nearly five months away, and the case was in a
27 "relatively dormant" state pending the outcome of the social
28 security appeal. (Id. at 3, 9.) Lacy justified his request for

1 leave to amend the scheduling order, in part, because he sought to
2 address the issue early to avoid the production and review of
3 documents "at the outset of trial." (Id. at 9.) Now, an appeal of
4 the adverse social security decision is pending, trial has been
5 continued twice, and oral argument is set for June 4, 2012, with
6 initial trial briefs due on April 30, 2012. The discovery cutoff
7 was nearly ten months ago.

8 Despite the current procedural landscape, however, the inquiry
9 is whether Plaintiff's lawyers were diligent from the time the
10 Court issued its scheduling order on September 24, 2010, to when
11 they first initiated discovery on April 13, 2011. Plaintiff argues
12 that counsel were diligent in prosecuting the case and that the
13 service of written discovery after the deadline was the result of
14 excusable inadvertence. (Mot. Amend Scheduling Order Attach. #1
15 Mem. P. & A. 5, ECF No. 16.) Lacy alleges that he would be
16 substantially prejudiced if he is not permitted to complete
17 discovery because the requested information is essential to the
18 full and fair consideration of his case. (Id.)

19 Plaintiff cites the multi-factor test outlined in United
20 States v. First National Bank of Circle, 652 F.2d 882, 887 (9th Cir
21 1981), to argue that leave to amend is appropriate. (Mot. Amend
22 Scheduling Order Attach. #1 Mem. P. & A. 4, ECF No. 16.) That
23 decision, however, dealt with amending the pretrial order. The
24 standard for amending pretrial conference orders is "to prevent
25 manifest injustice." Fed. R. Civ. P. 16(e). For requests to amend
26 the scheduling order, Federal Rule of Civil Procedure 16(b)
27 applies, and the inquiry is whether the movant was diligent.
28 Zivkovic, 302 F.3d at 1087.

1 In the Opposition, Defendants insist that waiting to initiate
2 discovery until one week before what Plaintiff's attorneys believed
3 to be the deadline for discovery is far from diligent. (Opp'n 1,
4 ECF No. 30.) Defendants allege that if a social security ruling
5 was central to Lacy's case, counsel should have taken affirmative
6 steps to stay this litigation or continue the dates outlined in the
7 scheduling order. (Id. at 2.) They argue, "[T]he dates assigned
8 by Your Honor were firm deadlines, and -- even if Plaintiff's
9 attorneys apparently chose to ignore them -- they continued to tick
10 by." (Id. at 3.) The Defendants also contend that Plaintiff's
11 attorneys knew of the adverse social security decision on December
12 9, 2010, or at the latest, on March 8, 2011. (Id. at 3-4.) If
13 Plaintiff's attorneys were diligent, they should have initiated
14 discovery immediately upon receipt of the administrative decision.
15 (Id. at 4.) Defendants urge that the Motion should be denied on
16 the additional ground that they will be substantially prejudiced
17 because of increased litigation costs and a further delay of the
18 trial. (Id. at 10-11.)

19 "A scheduling order is not a frivolous piece of paper, idly
20 entered, which can be cavalierly disregarded by counsel without
21 peril." Johnson, 975 F.2d at 610 (quotation omitted). "The use of
22 orders establishing a firm discovery cutoff date is commonplace,
23 and has impacts generally helpful to the orderly progress of
24 litigation, so that the enforcement of such an order should come as
25 a surprise to no one." Cornwell, 439 F.3d at 1027. The Ninth
26 Circuit has articulated the importance of scheduling orders:

27 In these days of heavy caseloads, trial courts in both
28 the federal and state systems routinely set schedules and
establish deadlines to foster the efficient treatment and

1 resolution of cases. Those efforts will be successful
2 only if the deadlines are taken seriously by the parties,
3 and the best way to encourage that is to enforce the
4 deadlines. Parties must understand that they will pay a
5 price for failure to comply strictly with scheduling and
6 other orders, and that failure to do so may properly
support severe sanctions and exclusions of evidence. The
Federal Rules of Civil Procedure explicitly authorize the
establishment of schedules and deadlines, in Rule 16(b),
and the enforcement of those schedules by the imposition
of sanctions, in Rule 16(f).

7 Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1060 (9th Cir.
8 2005).

9 Here, even accepting counsel's claimed misunderstanding of the
10 scheduling order, Plaintiff was not diligent by foregoing all
11 discovery for nearly seven months. Johnson, 975 F.2d at 609
12 ("[C]arelessness is not compatible with a finding of diligence and
13 offers no reason for a grant of relief."); see also Wei v. State of
14 Hawaii, 763 F.2d at 372 (concluding that the inadvertent failure to
15 calendar a deadline was neither excusable neglect nor good cause).
16 Without an order extending the discovery deadlines or staying the
17 litigation, the dates in this Court's scheduling order were not
18 suspended while Lacy's attorneys waited for a ruling on Plaintiff's
19 claim for social security benefits. See Cornwell, 439 F.3d at 1026
20 (finding that plaintiff's decision to forgo taking the deposition
21 of a third-party witness while discovery was open was unreasonable
22 and "not a diligent pursuit of discovery opportunities").

23 Furthermore, the discovery at issue is unrelated to Lacy's
24 claim for social security benefits. Separate sets of the twenty-
25 seven requests for admission, five interrogatories, and twenty-
26 seven requests for production of documents were served on each of
27 the two Defendants. (See Mot. Amend Scheduling Order Attach. #2 de
28 la Flor Decl. 3, ECF No. 16.) Except for affecting the amount of

1 ERISA benefits that may be payable, the social security ruling has
2 little relation to Lacy's claim for ERISA benefits. (See id.
3 Attach. #3, Exs. 2, 3, 4.) Furthermore, Plaintiff's entitlement to
4 social security benefits is still unresolved, because he has
5 appealed the decision denying his claim. Thus, the proffered
6 reason for not pursuing discovery earlier falls short and indicates
7 that Lacy's attorneys were not diligent.

8 Long before filing this Motion, Plaintiff knew that his
9 request for social security benefits was denied. See Du Maurier v.
10 Laguna Beach Police Dep't, Nos. SA CV 10-1855 SJO(JCG), 10-01976
11 SJO(JCGx), 2011 U.S. Dist. LEXIS 143658, at *7 (C.D. Cal. Sept. 2,
12 2011) (finding no diligence where plaintiff knew of the facts
13 forming the basis of his requested motion one month in advance of
14 the relevant deadline). If Lacy needed additional time to serve
15 written discovery, he should have sought an extension of time.
16 Plaintiff's written discovery was served after the Court-imposed
17 deadlines, and his attorneys have not shown that they were
18 diligent. See Panatronic USA v. AT&T Corp., 287 F.3d 840, 846 (9th
19 Cir. 2002) (finding lack of diligence where movant had "ample
20 opportunity to conduct discovery," but failed to do so); see also
21 Cornwell, 439 F.3d at 1027 ("We decline to limit the district
22 court's ability to control its docket by enforcing a discovery
23 termination date, even in the face of requested supplemental
24 discovery that might have revealed highly probative evidence, when
25 the plaintiff's prior discovery efforts were not diligent.")

26 **B. Depositions**

27 The Plaintiff also seeks leave to file a motion to compel
28 deposition testimony, which is untimely. First, although Lacy

1 received the Defendants' objections to the deposition notices on
2 May 5, 2011, he did not file a motion to compel the deposition
3 testimony before the May 23, 2011 discovery cutoff. Instead, the
4 Plaintiff filed this Motion to Amend on June 17, 2011, one and
5 one-half months after receiving the objections. Moreover, Lacy
6 failed to satisfy the meet and confer requirements set forth in the
7 local rules, constituting an additional procedural defect with the
8 proposed motion to compel.

9 **1. Deadline for filing a motion to compel**

10 On April 13, 2011, Plaintiff also served Defendants with a
11 notice of taking depositions. (Mot. Amend Scheduling Order Attach.
12 #1 Mem. P. & A. 2, ECF No. 16.) Lacy sought to depose five
13 individuals, Natalie Kern, Matt Szuba, JoAnne Fiore, Lisa
14 Touloumjian, and Eric Kelly. (Id. Attach. #3 Ex. 1, at 1.) The
15 Plaintiff also sought to take Rule 30(b)(6) depositions on three
16 topics from individuals most knowledgeable at Defendant
17 Metropolitan Life Insurance Company. (Id. at 2.) The depositions
18 were to take place on May 17, 18, 19, and 23, 2011. (Id. at 1-2.)
19 The Defendants served objections to the notice of taking
20 depositions on May 5, 2011. (Id. Attach. #1 Mem. P. & A. 2-3.)

21 In its scheduling order, the Court instructed:

22 All motions for discovery shall be filed no later than
23 thirty (30) days following the date upon which the event
24 giving rise to the discovery dispute occurred. For oral
25 discovery, the event giving rise to the discovery dispute
26 is the completion of the transcript of the affected
27 portion of the deposition. For written discovery, the
28 event giving rise to the discovery dispute is the service
of the response.

27 (Case Management Conference Order 1-2, ECF No. 11.) Because no
28 deposition took place, the event giving rise to the dispute was the

1 service of Defendants' objections on May 5, 2011. (See id.)
2 Absent the discovery cutoff, ordinarily, the Plaintiff would have
3 had thirty days, or until June 6, 2011, to file a motion to compel.
4 The discovery cutoff, however, lapsed even earlier, on May 23,
5 2011. Lacy filed this Motion on June 17, 2011, after the deadline
6 for raising the issue with the Court. Even if counsel immediately
7 filed a motion to compel after receiving the Defendants'
8 objections, the motion would have been untimely because the
9 discovery cutoff includes hearings on motions to compel and
10 discovery ordered as a result of a motion to compel.

11 **2. Motion to Amend filed after the close of discovery**

12 All discovery, including discovery ordered as a result of a
13 discovery motion, was to be completed by May 23, 2011. (Case
14 Management Conference Order 1, ECF No. 11.) Plaintiff filed this
15 Motion to Amend the scheduling order after the close of all
16 discovery. Lacy became aware of the discovery dispute on May 5,
17 2011, when the Defendants served their objections to the notice of
18 depositions. There were still two weeks before the deadline to
19 complete discovery, during which the Plaintiff could have filed a
20 motion to compel or requested an extension of time to do so while
21 the parties attempted to meet and confer. Instead, Lacy waited,
22 letting the discovery cutoff pass, before filing this Motion.

23 **3. Failure to meet and confer**

24 The local rules require parties to attempt to resolve
25 discovery disputes through a dialogue before seeking judicial
26 intervention. Specifically, Civil Local Rule 26.1 provides:

27 The court will entertain no motion pursuant to Rules 26
28 through 37, Fed. R. Civ. P., unless counsel will have
previously met and conferred concerning all disputed

1 issues If counsel have offices in the same
2 county, they are to meet in person. If counsel have
3 offices in different counties, they are to confer by
4 telephone. Under no circumstances may the parties
5 satisfy the meet and confer requirement by exchanging
6 written correspondence.

7 S.D. Cal. Civ. R. 26.1(a) (emphasis added). The local rules also
8 require the moving party to serve and file a certificate of
9 compliance with this rule when filing the motion. S.D. Cal. Civ.
10 R. 26.1(b). Although Lacy's Motion to Amend is brought pursuant to
11 Federal Rule of Civil Procedure 16(b), the proposed motion to
12 compel depositions does not comply with Civil Local Rule 26.1.

13 On June 6, 2011, one month after receiving Defendants' May 5,
14 2011 objections to the notice of depositions, Plaintiff's counsel
15 sent a belated meet-and-confer letter to defense counsel by
16 electronic mail. (Mot. Amend Scheduling Order Attach. #1 Mem. P. &
17 A. 4, ECF No. 16.) On June 13, 2011, defense counsel responded in
18 a letter by electronic mail, and Plaintiff filed this Motion four
19 days later. (Id. at 5.) Because counsel have offices in different
20 counties, Lacy's attorneys were not required to meet and confer in
21 person with defense counsel before raising the issue with the
22 Court. See S.D. Cal. Civ. R. 26.1(a). They were, however,
23 required to confer by telephone. Id. The local rules prohibit
24 meet-and-confer attempts made by written correspondence alone,
25 which was the extent of counsel's efforts. Id. Moreover, Lacy's
26 attorneys failed to include a certificate of compliance with the
27 rule when filing his motion. See S.D. Cal. Civ. R. 26.1(b).

28 **4. Analysis**

Lacy does not address why he did not file a motion to compel
deposition testimony before the May 23, 2011 discovery cutoff,

1 which explicitly encompasses discovery ordered as a result of a
2 discovery motion. Nor did his attorneys explain why they did not
3 attempt to meet and confer regarding these deposition disputes
4 before June 6, 2011. Lacy also failed to comply with the meet and
5 confer requirements outlined in the local rules. Plaintiff's
6 failure to follow local rules underscores a lack of diligence
7 evidenced by his attorneys' failure to meet court-imposed
8 deadlines.

9 In his Reply, Plaintiff's current attorney argues that the
10 deposition notices were timely served and were noticed for dates to
11 occur before the May 23, 2011 discovery completion deadline.
12 (Reply 4, ECF No. 32.) The current lawyer also alleges that good
13 cause exists to permit him to compel these eight depositions
14 because after receiving Defendants' May 5, 2011 objections,
15 Plaintiff "diligently pursued seeking his right to take the
16 depositions" by meeting and conferring and then filing the Motion
17 to Amend. (Id.)

18 Lacy's prior attorneys waited nearly seven months, from
19 September 24, 2010, to April 13, 2011, before noticing any
20 depositions. They also did not bring the dispute to the Court's
21 attention by the discovery cutoff or within thirty days of
22 receiving the May 5, 2011 objections. See Skinner v. Ryan, No.
23 CV-09-2152-PHX-SMM(LOA), 2010 U.S. Dist. LEXIS 122695, at *5 (D.
24 Ariz. Nov. 5, 2010) (denying a motion to compel that was filed more
25 than one month after the deadline for bringing discovery disputes
26 to the court's attention as untimely). Plaintiff's attorneys were
27 not diligent. They allowed the May 23, 2011 discovery cutoff to
28 lapse before seeking relief from the Court on June 17, 2011.

1 The Plaintiff has exhibited a general disregard for the
2 deadlines set forth in this Court's scheduling order as well as the
3 procedures described in the local rules. Lacy has not shown good
4 cause to amend the scheduling order to permit a motion to compel
5 depositions. See Johnson, 975 F.2d at 609 (emphasizing that the
6 good cause inquiry hinges on whether the moving party diligently
7 pursued discovery).

8 v.

9 **CONCLUSION**

10 For the reasons discussed above, Plaintiff's Motion to Amend
11 Scheduling Order to Allow Filing of Motion to Compel and Completion
12 of Discovery [ECF No. 16] is **DENIED**.

13 **IT IS SO ORDERED.**

14 Dated: March 16, 2012

15 
RUBEN B. BROOKS
16 United States Magistrate Judge

17 cc: Judge Miller
18 All Parties of Record
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